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**STATEMENT OF EDWIN F. LOWRY
DIRECTOR, CALIFORNIA DEPARTMENT OF TOXIC SUBSTANCES CONTROL
REGARDING THE READINESS AND RANGE PRESEVATION INITIATIVE
PROPOSED BY THE DEPARTMENT OF DEFENSE**

**PREPARED FOR THE
HOUSE COMMITTEE ON ARMED SERVICES, READINESS SUBCOMMITTEE
MARCH 13, 2003**

I am Edwin F. Lowry, Director of the California Department of Toxic Substances Control. My Department's charge is to protect public health and the environment in California from the adverse effects associated with exposure to hazardous wastes. In accomplishing this mission, we regulate hazardous waste management and oversee hazardous site cleanups throughout the State of California.

I appreciate the opportunity to offer my views concerning amendments proposed by the Department of Defense (DoD) to the Resource Conservation and Recovery Act (RCRA) and to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) with regard to the Readiness and Range Preservation Initiative. This statement represents the views of the Department of Toxic Substances Control related to our statutory responsibility to oversee the generation, transportation, treatment, storage, disposal, and cleanup of toxic substances in California.

Before I begin to outline our concerns with the proposed amending language for RCRA and CERCLA, I wish to make three contextual points:

1. I want to assure you of our strong and continuing support for ensuring the readiness of the United States armed forces. Further, we fully appreciate that combat training and

equipment testing is essential to making our armed forces the strongest military force on the globe.

2. California has more experience with environmental issues at military facilities than does any other State. My Department has been and continues to be involved with environmental cleanup at 29 closed or closing installations, more than twice the number as the next most affected State. We work with 107 other open military installations both on matters having to do with hazardous waste management and with site cleanup. Further, California is home to 1,090 formerly used defense sites, at least one quarter of which will require cleanup to restore the land to productive use. It is clear, then, that we bring to the discussion a great deal of practical experience with respect to environmental issues at military properties.
3. I am proud to report to you that my Department has established what I consider to be an exemplary record of collaboration with the DoD and with each of the military services. This productive and cooperative relationship manifests itself most obviously in the many situations in which we have exercised considerable flexibility in our regulatory oversight to accommodate the operational needs of specific installations. I have provided you with a handful of examples.

Having reviewed the proposed Readiness and Range Preservation Initiative language, my concerns focus on five areas, each of which I will expand upon briefly in a moment:

1. As a practical matter, this proposal could allow the military to designate *any* location as an operational range.
2. The proposal, as worded, could exempt non-military entities, such as defense contractors, from having to comply with current environmental regulations.
3. The proposal could limit our ability to adequately regulate or clean up closed training ranges.
4. The proposal could limit our ability to restore formerly used defense sites to productive use.
5. The proposal could allow significant unnecessary contamination of California's valuable groundwater resources.

To repeat a previous comment, while I strongly believe that providing adequate training and testing opportunities is imperative, I believe with equal conviction that doing so does not have to be at the expense of public health and natural resources in California.

National security involves many elements, including protecting our environment for generations to come and restoring the land and water that has been adversely affected by the

release of hazardous substances. In my estimation, this proposal sacrifices the security of California's and the nation's environment.

Let me now further describe the five concerns I noted.

First, the proposed amendments could jeopardize public health and safety by allowing DoD to avoid important environmental safeguards even when there is no immediate effect on military readiness. This is because the military could designate any location as an operational range, whether or not it had any plans to use it for testing or training. While Section 2019(a)(1) of the proposal would modify the RCRA definition of "solid waste" to include "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof" that are deposited on an "operational range" and are removed for treatment or disposal, it would exempt all wastes that are left on an "operational range," whether or not the range is still actually used for munitions testing or training.

The proposal also would severely curtail California's ability to regulate the practice of using open burning or open detonations to "treat," i.e., destroy explosives and unexploded ordnance. Given the known environmental impacts of this practice, which includes the release of metal fragments and toxic propellant residues, and the yet unknown environmental impacts, we find the proposal to be very troubling.

Second, the proposal is written broadly enough that it could apply anywhere that explosives or other covered materials are handled, even non-military facilities. Section 2019(a)(2) would exclude from the definition of "solid waste" any "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof" that are used in military training, research and development or testing, or deposited on an operational range." In other words, not only would it apply to military ranges, but it could also exempt defense contractors

from the requirements of RCRA. Defense contractors handle a number of hazardous substances that are constituents of munitions or their delivery systems, such as perchlorate.

Perchlorate contamination from defense contractor facilities is a pervasive problem in groundwater in California and also in the Colorado River. As we see more and more water purveyors forced to shut down their municipal wells, I can say with confidence that perchlorate contamination threatens the drinking water supplies of millions of Californians. Obviously, we can ill-afford to exempt from regulatory oversight defense contractors which might exacerbate this troubling situation.

Third, contrary to representations by DoD, the proposal has not been drafted to limit its effect to operational ranges. The language at the end of Section 2019(a)(2) states: "Nothing in subparagraphs (2)(A), (B), (C), (D), or (E) hereof affects the legal requirements applicable to explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof that have been deposited on an operational range once the range ceases to be an operational range." As written, this language would only apply to Section 2019(a)(2) and not to Section 2019(a)(1). Thus, this language would not affect materials left on an operational range, and these materials would still be excluded from the definition of "solid waste" by Section 2019(a)(1), even after the range ceased to be operational. The proposal would also narrow our authority to use CERCLA to ensure cleanups at military bases. Section 2019(b) would exclude from the CERCLA definition of "release" any "explosives, unexploded ordnance, munitions, munitions fragments, or constituents thereof" that are deposited and expected to remain on an "operational range." As stated above, the military could designate any location as an "operational range," including an inactive range that had not been used for that purpose for decades and might not ever again be used as a range. Moreover, the proposal would also limit our cleanup authority at closed ranges,

because materials deposited on a range when it was open could still be excluded from the definition of "release" even after it was closed. For obvious reasons associated with potential future land uses, this element of the proposal is completely at odds with the protection of public health and the environment.

Fourth, the circuitous exclusion described above could limit California's authority to ensure cleanups at formerly used defense sites. Currently, there are 1,090 such sites in California, of which at least 200 are likely to be contaminated with explosives and ordnance. These sites will pose obvious risks to public safety if they are not restored to safe conditions.

Fifth, the proposal would exclude from the definition of "solid waste" and the definition of "release" constituents of munitions (including perchlorate) in groundwater below a range as long as they had not migrated off range. Once contaminated groundwater migrates off range it can be far more difficult to contain, posing much higher risks and costs. As I noted previously, California's pervasive perchlorate contamination is causing the shutdown of public drinking water wells and other serious impacts at present. We object to any proposal that would allow a known problem to be uncontrolled until such time as an artificial boundary is crossed.

I have two additional, non-technical concerns. First, the section-by-section analysis prepared by DoD for this proposal claims, as the basis for this initiative, that:

In recent years...novel interpretations and extensions of environmental laws and regulations, along with such factors as population growth and economic development, have significantly restricted the military's access to and use of military lands and test and training ranges, and limited its ability to engage in live-fire testing and training.

As the Director of California's Department of Toxic Substances Control, do not agree with this conclusion. Far from significantly restricting the use of test and training ranges, I am not aware of any instances in California in which any hazardous waste management or cleanup requirement has impeded, limited or infringed on the military's ability to conduct mission-critical operations, including training or testing activities. In fact, nationally, the *Washington Post* recently quoted EPA Administrator Christine Todd Whitman as saying, "I don't believe that there is a training mission anywhere in the country that is being held up or not taking place because of environmental protection regulation."

Contrary to the DoD statement, my Department has consistently worked with DoD and the military services to resolve peripheral issues resulting from range use. For example, open burning of excess propellants and open detonation of munitions left over from live fire exercises may be managed under federally-delegated State hazardous waste management authorization in order to ensure that releases are properly controlled. These kinds of activities have no effect on the conduct of the range firing itself. Nevertheless, we have provided base managers with the necessary flexibility to carry out these activities. We routinely approve variances to allow military facilities to accumulate wastes beyond the normal time limits, and we issue emergency permits to allow the open burning of munitions that cannot safely be removed to the permitted treatment area.

For site cleanups on operating military bases, we have worked with base managers to position monitoring devices and schedule the collection of environmental samples in a manner that will avoid any conflict with ongoing military base operations. These are just a few of the many ways that we have worked cooperatively with the military to resolve issues arising from the implementation of environmental laws. The attached document provides other examples. If

the very premise of DoD's proposal is that California or any State has adversely affected the military's ability to maintain the highest state of readiness, I assert that the premise is flawed and, therefore, the proposal as a whole is unnecessary. In fact, our substantial record of cooperation with the military demonstrates that there is no need for the proposed RCRA and CERCLA amendments.

Finally, assuming the worst about other States' hazardous waste management and cleanup practices, to which I am hard-pressed to give an example, even if there were a situation in which RCRA or CERCLA interfered with essential live-fire testing or training, these statutes still provide extraordinary Presidential authority to suspend their application so that essential training activity could be continued. I am not suggesting use of this authority should become routine, nor that it be used lightly. Like all extraordinary powers, they must be used with respect and circumspection. But the fact remains that the authority is available. Congress has already provided remedies for extraordinary circumstances, and if they are insufficient, a much stronger justification needs to be put forth.

To conclude, I am concerned that DoD's proposal could lead to an open-ended inclusion of environmentally damaging activities under the umbrella of "readiness." As a result, not only might legitimate training and testing activities lead to avoidable releases of contamination, but other marginally-related activities might also cause avoidable releases of hazardous substances. The military, as responsible party, and State and federal regulators would then have to revisit these releases in the future as much larger and more expensive problems requiring cleanup.

I want to close by reiterating my strong desire to assist DoD and the military services in more practical ways. The Department of Toxic Substances Control will continue to work with the military to make effective use of their active range resources, and to improve the likelihood

that those ranges will continue to be sustainable into the indefinite future. We believe we have an obligation to actively assist our armed forces in improving and maintaining the high level of preparedness required by the times. Their well being and readiness are very important to all Californians, and we will work actively with their representatives to find ways to make range operations safe and workable. At the same time, we are obligated to protect California from environmental injury from all sources. I firmly believe that national security includes environmental protection and that there are better approaches to ensure that military security and environmental security complement, rather than counteract one another.